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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 411

JAMES S. O'CONNELL and FRANCIS L. HARNEY, JR.
PETITIONERS

v.

UNITED STATES OF AMERICA

No. 412

CHARLES H. LAWTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 507-527; Pet. No. 411, App. 1-21; Pet. No. 412, App. 1-21) is

not yet reported.[1] A prior opinion of the court of appeals is reported at 300 F. 2d 761.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1962 (R. 508, 527). A consolidated petition for rehearing was denied on August 7, 1962 (R. 538). The petitions for writs of certiorari were filed on September 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conspiracy to defraud the United States was charged by an indictment alleging that petitioners conspired to prevent, through trickery and deceit, a fair valuation of land taken by Massachusetts for highway purposes, ninety per cent of whose cost was reimbursable by the federal government under the federal highway program.

2. Whether the evidence was sufficient to support petitioners' convictions.

3. Whether various rulings on the evidence were proper.

4. Whether the existence of adverse publicity deprived petitioners of a fair trial.

STATUTES INVOLVED

The pertinent provisions of 23 U.S.C. 101, 105, 106, and 110 are:

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[1] The record consists of five volumes. Volumes I through III are consecutively paginated and will be referred to as "R."

Sec. 101(a). As used in this title, unless the context requires otherwise—

* * * *

The term "project" means an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed.

The term "project agreement" means the formal instrument to be executed by the State highway department and the Secretary as required by the provisions of subsection (a) of section 110 of this title.

* * * *

(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System", is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the thirteen years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending June 30, 1969, * * * and that the entire System in all

States be brought to simultaneous completion.

* * *

Section 105(a). As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

* * * * *

Section 106(a). Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an opproved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

* * * * *

Section 110(a). As soon as practicable after the plans, specifications, and estimates for a specific project have been approved, the Secre-

tary shall enter into a formal project agreement with the State highway department concerning the construction and maintenance of such project. Such project agreement shall make provision for State funds required for the State's pro rata share of the cost of construction of such project and for the maintenance thereof after completion of construction.

STATEMENT

A one-count indictment returned in the United States District Court for the District of Massachusetts charged petitioners and five others (who were not named as defendants) with having conspired to defraud the United States and the Bureau of Public Roads of the Commerce Department, in violation of the general conspiracy statute, 18 U.S.C. 371 (R. 8-16). Specifically the indictment charged that the conspirators, with knowledge that Massachusetts would apply for federal funds in partial reimbursement of the cost of acquiring land for highway purposes, prevented a fair evaluation of the land and caused Massachusetts to pay to the Damort Land Corporation sums in excess of what the owner would have been willing to accept, diverting to themselves a large portion of the federally reimbursable funds paid by Massachusetts (R. 12-14). After a six-day trial in October and November 1961, petitioners were found guilty as charged (R. 290). Each was sentenced to imprisonment for one year and fined $5,000 (R. 72-77). The convictions were affirmed on appeal (R. 507-527; Pet. No. 411, App. 1-21; Pet. No. 412, App. 1-21).

1. *The Highway Program.*—Federal grants to states for highway construction proceed through four general stages (see 23 U.S.C. 101, *et seq.* and R. 91-94). (1) At the outset, the federal government allocates a general fund for a state, and a State desiring to avail itself of such funds submits for approval a program for a particular type of construction (see 23 U.S.C. 105). (2) After the general project has been approved, more detailed plans are submitted, such as the layout of a right-of-way. When these plans are approved, the federal government reserves the money requested out of the general fund allocated to the State. (3) Thereafter, the State submits to the federal government more exact and detailed plans of the particular construction, such as the exact boundaries of land to be taken for a right-of-way. Upon approval of such plan, the Bureau of Public Roads places the necessary funds in an "obligated" state. Section 106 of Title 23 provides for the approval of the plans "for each proposed project included in an approved program" and further provides that "approval of any such project shall be deemed a contractual obligation of the federal government for the payment of its proportional contribution thereto." (4) No payment by the federal government is actually made until a project agreement has been entered into, as provided in 23 U.S.C. 110 and applicable regulations, covering construction and maintenance and payment of the State's pro rata share.

As to the project here involved, the Bureau of Roads of the Department of Commerce had, prior to

September 1958, approved a request by Massachusetts for the establishment of Interstate Highway Route 95 as part of the interstate roadway system in Massachusetts (stage one) (R. 99).[2] In September 1958, the Massachusetts Department of Public Works submitted to the Bureau of Public Roads eight items of proposed right-of-way acquisition, including a projected right-of-way acquisition of 11.5 miles of land in and about Attleboro, Massachusetts (the "Attleboro right-of-way") (R. 101, 130-131, 291-295). The estimated cost of acquiring the Attleboro right-of-way was $4,000,000 and on approval, this amount was reserved (stage two). In April 1959, after a public hearing, the Department of Public Works submitted for approval to the Bureau of Public Roads detailed plans for the acquisition of the Attleboro right-of-way (R. 103-104, 131, 297). In May 1959, the Bureau of Public Roads approved these plans and "obligated" $2,349,000 of federal funds for that project (stage three) (R. 104, 132, 298).

A "project agreement" (stage 4) had not been executed between the United States and Massachusetts as of the date of the return of the indictment on August 18, 1961 (R. 110-111).

2. *The Fraud.*—From 1959 to 1961, petitioner O'Connell was a practicing lawyer in Boston, Massachusetts. Petitioner Lawton operated a real estate

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[2] Interstate Route 95, which was under construction at the time of trial, is a four-or-six lane highway which runs from the Rhode Island border through Attleboro and the Boston area up to the New Hampshire line at Salisbury (R. 97, 103-104, 297, 440-441).

agency, the C. H. Lawton & Son Company, of Pawtucket, Rhode Island. Petitioner Harney was employed as a right-of-way negotiator for the Massachusetts Department of Public Works. Co-conspirator Walter Webb was the president and sole stockholder of the Damort Land Corporation.

The Damort Land Corporation owned, as its sole asset, a tract of land of about 32,500 square feet in South Attleboro, Massachusetts, on which there was a large frame warehouse, a small frame building, a short railroad spur track, and a chain link fence (R. 133, 159, 171-172, 212, 406-408, 413-414, 429). In late 1957, the land had been rented to a wholesale lumber company, and from late 1957 to about May 1960 to a dairy (R. 133-135, 158, 168-169, 171-172). During this period, Webb had the property listed with the Lawton Company for sale (R. 133-134), but a buyer for the property could not be found. The Lawton Company acted as agent for the property until it was acquired by Massachusetts in 1960 (R. 134-135, 136, 158-159, 160).

In early 1959, William Myette, an employee of the Lawton Company, learned that the Attleboro right-of-way for Route 95 would go through Damort's land. He suggested to Webb that the property be removed from the market inasmuch as the State would be the best buyer (R. 136-137, 172-173). Webb then took the property off the market.

In May 1959, petitioner Harney, who had done preliminary work for the Department of Public Works, told Myette that the State would take Damort's property (R. 137-138, 140-141, 248-249, 370, 443).

At a meeting between Harney and Myette on the property, at which petitioner Lawton was present, Harney said that where the state is about to take land, it was often better if the owner had some representation in Boston (R. 142); that O'Connell was a lawyer who could help in "getting as much money as possible for the land" and had a brother in the Governor's office who could "make the way clear and easy for the sale of the property" (R. 142, 166). Myette relayed the conversations with Harney to Webb, who instructed Myette to contact O'Connell and handle the situation for him (R. 143, 162, 175-176, 201, 205). Harney was present at a meeting in O'Connell's office at which Myette and Lawton spoke to O'Connell about representing Webb (R. 145-146, 162).

At about this time (May or June 1959), Harney telephoned Webb and asked how much money he wanted for the Damort property. When Webb said that he wanted $30,000, Harney asked whether it would be all right to obtain $35,000, to which Webb replied in the affirmative (R. 174, 182). In early July 1959, O'Connell was retained as attorney for the Damort Corporation (R. 118, 176-178, 201-204, 304, 446-447, 455-456). There was no fee arrangement (R. 212).

On August 10, 1959, Massachusetts took 29,500 square feet of Damort's property for the completion of a link in Route 95 by filing an order of taking in the registry of the county (R. 332; see R. 515). In July 1959, on a preliminary appraisal by an employee of the Massachusetts Department of Public

Works, the property was valued at $35,000 (R. 123-124, 305). In November 1959, Errol Hopkins, a right-of-way negotiator for the State, contacted Webb about the property, and Webb referred him to O'Connell. Subsequently Harney told Webb that Hopkins had been "taken care of" (R. 169-170, 178-180, 445, 448-449).

The practice in Massachusetts was to appoint two independent "fee" appraisers if land to be taken was estimated to be worth more than $2500. The appraisals, plus one made within the Department by a negotiator, would then be forwarded to the Real Estate Board of Review which would set a maximum figure for out-of-court settlement (R. 116-117). After two appraisers had been named to evaluate the Damort property, someone in the Department of Public Works substituted the names of Joseph Schwartz and Evert Collins (R. 112-113, 237, 239, 245, 305, 311, 357). In December 1959, Collins and Schwartz appraised the Damort property at $65,000 and $67,000, respectively (R. 126-127, 301, 317, 334, 368, 371-410, 411-421). At about this time, Hopkins, acting as appraiser for the Department of Public Works, appraised the land at $54,000 (R. 124-126, 301, 317, 334, 335-336, 367-368). After an examination of the appraisals, the Departmental Real Estate Review Board sent the Damort land matter back for another appraisal (R. 118). The Department appointed Lawton, who was not on the list of approved independent appraisers maintained by the Department, to appraise the land as an independent "fee" appraiser (R. 114-

115, 118, 127-128, 180-181, 240, 241-243, 319, 320, 453). In February 1960, Lawton appraised the Damort property as of July 28, 1959, at $60,000 and certified under oath that he had no present or prospective interest in the land and never had had such an interest in the property (R. 114-115, 120, 127-128, 150, 301, 317, 320, 334, 422-432, 517).

The Real Estate Review Board subsequently set the maximum figure for out-of-court settlement on the Damort property at $60,000. On March 29, 1960, Webb signed a settlement agreement with the State for $60,212.03, apportioned as follows: Damort Land Corporation, $47,383.37; Rhode Island Hospital Trust Co., mortgagee, $12,269.97; City of Attleboro, for taxes, $558.69 (R. 303, 323, 325, 327, 329, 330, 331-332, 333, 334, 337, 338; see R. 181-182, 218).

On April 4, 1960, Webb met O'Connell and Harney at O'Connell's office (R. 182-183). Webb endorsed to O'Connell the check from Massachusetts to the Damort Corporation of $47,383. When Webb asked "how the price could be arranged at $60,000," and what would happen if somebody asked him any questions about the price, O'Connell said that the land was worth $60,000 and suggested that it would not be wise to indicate that Harney had been seen in O'Connell's office (R. 184-185).

A few days later, O'Connell gave Webb a check for $47,383, the mortgage on the Damort land having been discharged by check from Massachusetts to the mortgagee (R. 187, 325). Shortly thereafter, Webb was billed for and paid $1,500 to the Lawton Company, which represented a five percent "commission"

on $30,000, the price which Webb received for the property (R. 151, 161, 188-189, 232, 355).

In the summer of 1960, Webb was interviewed by F.B.I. agents. Shortly thereafter, Lawton, Myette, and Webb met in Webb's office (R. 152). Lawton, who had brought a file of papers to the meeting, asked Webb if he would permit the removal and destruction of certain papers relating to the valuation of the Damort property and the $1,500 invoice of the Lawton Company (R. 190-191; see R. 153-154). Webb then removed certain papers from his file, tore up those papers, and deposited them in a waste basket (R. 154-156, 190). According to Myette, there was an "impression" that the papers removed from Webb's files would reflect a "different valuation than the one that Mr. Webb was paid under" (R. 156; see R. 191).

ARGUMENT

1. Petitioners attack (Pet. No. 411, 13-18; Pet. No. 412, 10-12) both the indictment and the sufficiency of the evidence on the ground that the federal interest in the highway project was not sufficiently substantial to hold them liable for a conspiracy to defraud the United States. The court below succinctly answered this contention when it stated (R. 512-513):

> [C]heating or overreaching the Commonwealth with respect to the amount it paid for land taken by it for federal highway purposes would in the end expend itself upon the federal government to the extent of 90% under the federal aid road act thereby obstructing one of its lawful func-

tions and if successful subjecting it to pecuniary loss by causing it to pay more than it needed to for the land.

The United States has a vital interest in the federal-aid highway program in the States, a program designed to aid interstate commerce and to augment the nation's defense highway needs. 23 U.S.C. 101 (b), *supra*, pp. 3-4. See H. Rep. 2022, 84th Cong., 2d Sess., pp. 2, 8; S. Rep. 1965, 84th Cong., 2d Sess., pp. 1-2; *United States* v. *Certain Parcels of Land in Knox County, Tennessee*, 175 F. Supp. 418, 421-423 (E.D. Tenn.). The statutory framework of this program and the record as to this project itself both show the federal-state interrelationship (see *supra*, pp. 6-7).

The grant-in-aid program for highways not only involves federal interest, but federal money. Ninety per cent of the cost of the project will be paid by the federal government through grants-in-aid. 23 U.S.C. 120. In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544, this Court noted that government money "is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states," and that grant-in-aid funds "are as much in need of protection from fraudulent claims as any other federal money." The federal government therefore may properly punish conspiracies to defraud which increase

the expenditure of federal grants-in-aid even though they are aimed in the first instance at a State.[3]

Petitioners specifically argue that the United States was not obligated to reimburse Massachusetts for the costs of the highway project until the entire project, including a project agreement, had first been approved by the Bureau of Public Roads, and that such a project agreement had not been executed at the time that the indictment was returned. However, while payment could not be made to the State by the federal agreement until a project agreement had been executed, under 23 U.S.C. 106(a) approval of the specific plans in an approved program (stage three; see *supra*, p. 6) gives rise to a contractual obligation of the United States. Both the definitions of 23 U.S.C. 101 and the administrative practice show that there is no merit in the contention that this obligation cannot arise as to a specific portion of a larger project. "Project" is defined in section 101 to include a particular portion of a highway and "highway" is defined as including "rights of way." Hence, federal approval of the right of way in this case constituted approval of a project within Section 106(a), which obligated the United States.

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[3] *United States* v. *Kaiser*, 179 F. Supp. 545 (S.D. Ill.), relied upon by petitioners, did not involve a grant-in-aid program but merely federal permission to construct a toll bridge over a navigable stream. The federal interest in having the bridge become toll free in the future was held not sufficient to justify prosecution of state employees who were embezzling tolls which belonged to the state.

2. The facts summarized in the Statement refute petitioners' arguments that the evidence is insufficient to support the verdict because the government did not show that the price paid was in excess of the fair market value (Pet. No. 411, 18-19; Pet. No. 412, 12-13) and did not sufficiently show the participation of each individual petitioner in the conspiracy (Pet. No. 411, 26-27; Pet. No. 412, 13-18).

a. As the court of appeals noted, the real question was not the fair value of the land but whether the State and ultimately the United States were tricked. The district court, however, imposed on the government a heavier burden of proof by requiring the jury to find that the price paid was in excess of the market value in order to convict petitioner. Thus, the district judge told the jury that the government's theory was that the defendants conspired "to get more than the land was worth and they ask you to reach the inevitable conclusion that the price was not only in excess of the fair market value of the land, but was procured through the deceit, trickery, and illegal acts of these defendants" (R. 286-287). In determining whether more than fair value was paid, the district court charged the jury that Webb's willingness to sell at $30,000 did not necessarily show the fair market value, but would be some evidence of what Mr. Webb thought it was. Certainly there was no prejudice to petitioners (see Pet. No. 412, 22-23) by the trial court's instruction requiring the jury to find more than was necessary to show a federal crime. The judge's charge clearly instructed the jury that

to find petitioners guilty it must find the fact necessary to support guilt—that petitioners acted with trickery and deceit to interfere with the lawful functions of the United States in the acquisition of land (R. 288-289).

In any event, the jury found that petitioners were guilty and thus, under the court's instructions, necessarily found that the price exceeded fair market value. This finding was amply supported by the gross disparity between the price paid ($60,212) and the price the owner was willing to accept ($30,000) for property which had been on the market for several years, the early appraisal by the Department of Public Works, ($35,000), and the testimony of the government's expert Beasley (discussed *infra*, pp. 18-20).

b. The evidence clearly showed that each of petitioners worked together fraudulently to raise the valuation of Damort's land. As to Harney and O'Connell, the evidence showed that Harney, a state employee, suggested to Myette and Lawton that O'Connell represent the Damort Land Corporation, and Harney was subsequently present at a number of meetings in O'Connell's office; that Harney said in O'Connell's office, when Webb asked how the price could be arranged, that three appraisals had been obtained and that Lawton gave the fourth; that Harney told Webb in O'Connell's presence that Hopkins, the State negotiator, had been "straightened out" and Hopkins subsequently appraised the Damort land at $54,000; that O'Connell suggested to Webb, in the

presence of Harney, that it would not be wise to indicate that Webb had seen Harney in O'Connell's office, and that Webb should say he had met O'Connell prior to the land dealings with the state; and that O'Connell received a $30,000 fee on a $60,000 transaction. In short, there was ample evidence that Harney and O'Connell were not innocent bystanders and were aware of wrongdoing. The jury could reasonably infer that the two men were instrumental in the fraudulent and successful efforts to get favorable appraisals, even though the exact means of doing so were not developed.

As to Lawton, we may assume that he was merely acting in the capacity as a real estate broker for Webb when he arranged for the retainer of O'Connell. But certainly at the time he acted as an appraiser, attesting that he had no interest in the property, and appraised the property at $60,000, he knowingly and actively participated and assisted in the conspiracy. His consciousness of guilt is shown by his deliberate destruction of records relating to the transaction.

3. Petitioners raise various objections to rulings on evidence, none of which present issues warranting review by this Court.

a. The conditional reception of evidence of acts and declarations of co-conspirators.—Petitioner Lawton contends (Pet. No. 412, 19) that some limitations should be placed upon the "device" of introducing evidence of acts and declarations of co-conspirators made in the absence of a defendant. The short answer is that the court was careful to point out to the jury

during the trial that certain evidence of acts and declarations of conspirators made in the absence of one or more petitioners was admissible only against the declarant and the parties present, and that that evidence could not be used against the remaining petitioners until they were shown by independent evidence to have been connected with the conspiracy (R. 138-140, 143, 147, 148, 149, 150, 151, 152, 153, 156, 157, 170, 173, 174, 176, 186). In its instructions to the jury, the court properly charged that once the jury has found that a conspiracy existed, the acts and declarations of co-conspirators were binding upon all members of the conspiracy even if performed in their absence, but that, "before a defendant can be charged with the acts of others, or before he can be found guilty, you must find the fact that he had knowledge that such an agreement existed, that such a plan was in operation" (R. 285-286). These instructions were in accord with the law as laid down by this Court. *Glasser* v. *United States*, 315 U.S. 60, 74; *Lutwak* v. *United States*, 344 U.S. 604, 617.

b. The testimony of Oscar Beasley.—At the trial, the government called one Oscar Beasley, a real estate appraiser from the District of Columbia whose firm had been employed by the Bureau of Public Roads to study real estate values in various states, including Massachusetts. He testified that he had made a study of real estate values in South Attleboro, Massachusetts, during which he examined and surveyed the property of the Damort Land Corporation, and that the Bureau of Public Roads had given him the appraisals of Lawton, Hopkins, Collins, and

Schwartz to examine as to the authenticity of the facts contained in them (R. 254-257, 267). The district court did not allow Beasley to testify as to whether the appraisals followed the rules sent to "fee" appraisers by the Massachusetts Department of Public Works (R. 259) and did not permit him to express his opinion as to whether the sales tested by Schwartz were true comparative values (R. 261). Beasley was allowed to testify that the zoning of the Damort property was industrial whereas the sales listed by Schwartz were of business property; that four sales listed by Schwartz were the same as four of the five sales listed by Collins; and that one such sale appearing in both appraisals indicated that 48,224 square feet of land and improvements had been deeded by the "Whiteman's Diner, Inc." to "Almac's, Inc.," whereas, according to the land registry, the square footage of property conveyed was 120,724 and the grantor was one "John Bellegris" (R. 262-265). The court of appeals ruled that, insofar as Beasley testified to what he had seen in the registry, this violated the best evidence rule. The court of appeals, however, went on to say that petitioners had failed to make proper objection on that ground, and that, if such an objection had been made, this would have alerted the government to produce the original document and obviate the objection. The court's ruling was correct and in any event the error, if there was one, was harmless.

It is evident that the judge's rulings limiting testimony by Beasley made the witness less important to

the government than the prosecutor probably expected him to be, but there is no foundation for the claim (Pet. No. 411, 22-24; Pet. No. 412, 21-22) that the calling of Beasley was intended merely to generate hostility. The trial judge had ruled that he would not take evidence as to what Damort had paid for the land to show that the appraisals were not honest (R. 129, 136). The government through the testimony of Beasley tried to show the dishonesty of the appraisals by indicating that the same errors appeared in two appraisals of the free appraisers. The natural person to call was the man who had studied the problem for the government. Since petitioners still insist that the government had to show, not only that the appraisals were dishonest, that they were wrong—and, as we have seen (pp. 15-16), the district court so instructed the jury—they are in no position to complain that the government should not have shown errors in the appraisals.

c. Testimony concerning the destruction of records —At the trial, the court permitted Myette to testify over objection that, in the summer of 1960, he, Lawton, and Webb met at Webb's office where they discussed a recent interview of Webb with F.B.I. agents, and that, at the meeting, Webb removed from his files and tore up certain papers which "might have something to do with leaving an impression of a false evaluation" (R. 153-156) The court limited the testimony "as of this time" to Lawton (R. 153, 156). Webb testified without objection that Lawton brought his files to the meeting; that Lawton asked Webb whether he would consent to the removal and destruction

of certain papers relating to the valuation of the Damort property and of the $1,500 "commission" invoice; and that Webb subsequently removed from his files and tore up certain papers (R. 190-191). Webb testified at the trial that "it was considered wise to remove from the files this reference to the $30,000 figure that [he] had asked for" (R. 191).

As to petitioner Lawton, who directly participated in the destruction of the records, the evidence was clearly admissible as showing consciousness of guilt. Concerning the other petitioners, the fact of the destruction of the records was admissible as an act relevant to prove that a conspiracy existed. Thus, in *Lutwak* v. *United States*, 344 U.S. 604, 617-618, this Court held that evidence of acts, which occurred after the conspiracy had ended showing that no real marriages had existed was admissible to show that a conspiracy had existed, to obtain illegal entry for aliens as wives of veterans. While the declaration attributed to Lawton by Webb—the request to permit the destruction of the papers—is technically not admissible against the two others since it was a declaration after the conspiracy had ended, the admission of this minor evidence intimately bound up with the admissible testimony as to the act of destruction was harmless.

d. Production of Reports.—On cross-examination, Webb testified that he had been interviewed by F.B.I. agents on two occasions in September 1960 (R. 194-195, 223), and on six or eight occasions between February and August 1961 by investigators of a committee of the House of Representatives (R. 195-197, 223). Pursuant to demands by petitioners for

production of the reports of the interviews, government counsel produced the F.B.I. reports and indicated to the court that there was no "report" of the committee (R. 192, 198). At the bench, government attorneys said that they possessed a three-page unsigned summary by the committee investigators which was "just a compilation of their interview" (R. 199). After examining the document, the court denied production under 18 U.S.C. 3500 and ordered the exhibit marked for indentification and sealed (R. 199-200). Petitioners then requested a *voir dire* examination in order to "bring on whoever made this report * * * to see whether it is admissible," which motion was denied (R. 200).

Contrary to the contention of petitioners O'Connell and Harney (Pet. No. 411, 19-21), the trial court properly denied production of the committee summary and a *voir dire* examination into its compilation since the exhibit and Webb's testimony showed that the exhibit was not, and could not have been, a producible statement under 18 U.S.C. 3500. Section 3500 requires the production of statements made by government witnesses to government agents only if it is a written statement "signed or otherwise adopted or approved" by the witness or is "a substantially verbatim recital of an oral statement * * * recorded contemporaneously with the making of such oral statement." The exhibit was not signed and there was nothing to suggest that it had ever been seen, much less adopted, by the witness. Webb's testimony that at one interview the investigators had made reference to a prior interview with him and that he

thought that he had agreed with what the investigators had "quoted" to him (R. 196) hardly suggests that Webb had seen and adopted any report.[4] There was also no need to hold a hearing to determine whether the report represented a substantially verbatim account of what Webb had said. From the face of the report, the court could determine that the report could not have been a substantially verbatim account. *Palermo* v. *United States*, 360 U.S. 343, 355. The exhibit was apparently a mere three-page summary of six or eight interviews with at least four investigators over a period of about six months. The court of appeals indicated that the summary was drawn from a variety of sources, including Webb, prepared by some unnamed party or parties and "roughly comparable to the statement of facts embodied in [the court's] opinion" (R. 524).[5]

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[4] The pertinent question asked of Webb and his reply was as follows (R. 196): "Q. Well, maybe I misled you with the word 'adopt.' When the Blatnik Committee interviewed you the second time, and they made references to the interview that they had had with you on the first occasion, and as they made quotations to you from what you had said on the first occasion, did you agree that what they quoted to you as your testimony previously was correct as you had given it to them? A. Yes, I think that is so." Webb had not testified, prior to the question, that the investigators had made "quotations" to him.

[5] In addition, it is very doubtful that an investigator of a Congressional committee is an "agent of the Government" within the meaning of 18 U.S.C. 3500. That section was designed to require the prosecution to produce statements made by witnesses to investigators connected with the prosecution or, at the least, the executive branch. It was

4. Before trial, the United States Attorney moved the court for the issuance of a subpoena to the Massachusetts Department of Public Works for the production of certain documents and records, alleging that he believed that certain documents were missing from the State's files and that he "should have the opportunity to know prior to trial what documents called for are missing and unavailable" (R. 29, 30-32). The motion was granted. Shortly thereafter, the State produced the documentary evidence called for in the subpoena (R. 2). Following this action, petitioners moved to dismiss the indictment or, in the alternative, to continue the trial on the ground that an "avalanche of publicity" generated by activities of the State and the United States would operate to deny them a fair trial as guaranteed by the Sixth Amendment (R. 33-54). They alleged that a large amount of publicity resulted from the government's application for the subpoena of records from the state, as well as from the investigative activities of the House committee. After a hearing, the court denied the applications. The court of appeals held that such publicity as there was did not serve to deprive petitioner of a fair trial and that the district court had carefully screened each juror on the *voir dire*.

There is no reason to review the ruling of the court of appeals that denial of petitioners' motion was

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not intended to require an entirely different branch of the government, which has broad, inherent powers to investigate for a completely different purpose, *i.e.*, for purposes of legislation, to reveal documents in its files.

a proper exercise of the district court's discretion. Most of the publicity complained of was not directly related to petitioners; instead, it concerned corruption in general, investigations into the Department of Public Works of Massachusetts, and the investigative activities of the Boston Finance Commission, especially as they related to one John McGrath and his attorney (R. 34, 40, 45, 48, 433-435). While the House Committee was investigating scandals in the administration of the federal-aid highways program, no hearings by that committee had been conducted into suspected scandals in Massachusetts at the time of the trial. It was not until after the trial that the Committee inquired into the administration of the federal-aid highway program in Massachusetts, including the activities of petitioners and their cohorts; and it was chiefly this activity upon which petitioners moved the court of appeals for dismissal of the indictment during the pendency of the appeal because of an alleged inability on the part of the court of appeals to afford them an impartial appeal and consideration of the case (R. 461-502; Exs. 4-70). See 300 F. 2d at 761. While there was some newspaper publicity concerning the motion of the United States Attorney for the issuance of the pretrial subpoena for production of records, this motion was in no way improper. The fact that his conduct in this regard reached the newspapers affords no basis for petitioners "inescapable conclusion" that it was the purpose of the government to try the case in the newspapers and over the radio and television.

The jury was examined on the *voir dire* as to whether they had formed any opinion regarding the guilt or innocence of petitioners, and whether any of them possessed any prejudice for or against the defendants which would keep him from determining the question of guilt or innocence on the evidence (R. 437, 438). No showing was made either at that time or during the trial that any of the jurors was subjected to or affected by any adverse publicity. The court cautioned the jury on two occasions during the trial to refrain from reading any newspaper accounts of the case, or listening to or watching radio, television, or the "public media on the events of this trial" (R. 86, 275). It repeated this admonition in its instructions, and charged the jury that they were to decide the case solely upon the basis of the testimony, exhibits, and the logical inferences which are to be drawn from them (R. 277-278). The jury must be presumed to have followed these instructions. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

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